

USAWC STRATEGY RESEARCH PROJECT

UNITED STATES POLICY ON DETAINEES
CAPTURED DURING THE GLOBAL WAR ON TERROR
IN LIGHT OF THE UNITED STATES SUPREME COURT
DECISIONS IN *RASUL V. BUSH*, *RUMSFELD V. PADILLA*,
AND *HAMD V. RUMSFELD*

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ABSTRACT

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Since 11 September 2001, the United States has detained hundreds of individuals, to include three U.S. citizens, as unlawful enemy combatants during its Global War on Terror. Because of the nature of their detention, a number of these detainees sought legal review of their status and detention in various U.S. federal courts. These cases ultimately reached the U.S. Supreme Court and in June of last year the Court released three decisions addressing the Administration's detention policy.

This paper provides a background on the development of the current U.S. detainee policy, analyzes the Supreme Court decisions in *Rasul v. Bush*, *Rumsfeld v. Padilla*, and *Hamdi v. Rumsfeld* addressing that policy, and then outlines certain policy options available to the Administration in response to those decisions. It concludes by offering a recommendation on the best policy option available and the risks associated with that option.

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**UNITED STATES POLICY ON DETAINEES CAPTURED DURING THE GLOBAL WAR ON TERROR IN
LIGHT OF THE UNITED STATES SUPREME COURT DECISIONS IN *RASUL V. BUSH*, *RUMSFELD V.
PADILLA*, AND *HAMD V. RUMSFELD***

On 28 June 2004, the United States Supreme Court released three decisions, *Rasul v. Bush*¹, *Rumsfeld v. Padilla*², and *Hamdi v. Rumsfeld*³, significantly affecting the legal status of U.S. citizen and foreign detainees held as enemy combatants in the United States and at Guantanamo Bay, Cuba, in the Global War on Terror (GWOT). Read together, the decisions granted all of these detainees, U.S. citizen or foreign, the right to challenge their detention in a hearing before a neutral decisionmaker.⁴ The Administration's response was swift. On 7 July 2004, the Department of Defense announced the establishment of a Combatant Status Review Tribunal to review the detention of all detainees held at Guantanamo Bay.⁵ The Administration did not announce a review of its original decision to treat Taliban and al Qaeda members as unlawful enemy combatants. Should it have done so? What do the Supreme Court decisions in *Rasul*, *Padilla*, and *Hamdi* portend for future judicial involvement in the President's role as Commander-in-Chief during the GWOT? What is the appropriate level of judicial scrutiny of decisions made by the President as the Commander-in-Chief? What changes, if any, are necessary to the current blanket U.S. policy to treat Taliban and al Qaeda members as unlawful enemy combatants in light of *Rasul*, *Padilla*, and *Hamdi*?

BACKGROUND

On September 11, 2001, nineteen Islamic terrorists attacked the United States. After commandeering four civilian airliners, the terrorists flew two planes into the World Trade Center in New York City and one plane into the Pentagon in Alexandria, Virginia. The fourth plane crashed in an empty field in southwestern Pennsylvania, after the passengers on board stormed the cockpit. The terrorists murdered nearly 3000 mainly U.S. citizens in the worst terrorist attack ever on U.S. soil.⁶ Three days later Congress authorized the President to use all necessary force to bring those responsible for the attacks to justice.⁷ All evidence pointed to Osama Bin Laden and his international terrorist organization, al Qaeda. He and other members of al Qaeda were currently living in and operating from Afghanistan under the nominal protection of the Taliban regime.⁸ On September 20, 2001, in a televised address to a joint session of Congress and the American people, President Bush issued the Taliban regime an ultimatum—give up Osama Bin Laden and other al Qaeda members or face the consequences.⁹ The Taliban refused. On October 6, 2001, the President reiterated his ultimatum. In a radio address to the nation, President Bush accused the Taliban of turning Afghanistan into “a sanctuary and

training ground for international terrorists.”¹⁰ Presaging the events of the following day, he stated, “Full warning has been given, and time is running out.”¹¹ On October 7, 2001, U.S. warplanes began dropping bombs on designated Taliban targets.¹² The war in Afghanistan had officially begun. Twelve days later U.S. troops began entering Afghanistan¹³ to assist the Northern Alliance in defeating the Taliban regime and to root out and destroy al Qaeda and its operatives.¹⁴ Less than two months later, the war was essentially over. Northern Alliance and U.S. forces had routed the Taliban regime and al Qaeda was on the run. On December 22, 2001, Hamid Karzai became head of the new interim Afghan government.¹⁵

INITIAL UNITED STATES DETAINEE POLICY

As a result of the conflict in Afghanistan, U.S. forces captured and detained numerous individuals, both al Qaeda and Taliban. This resulted in a dilemma: How should the United States treat these captured and detained persons and what laws should apply? Specifically, did the Geneva Conventions¹⁶ apply to the conflict in Afghanistan? Significant competing policy considerations arose. On the one hand, the United States needed a policy that would support its national security by allowing for the indefinite detainment of dangerous persons, the collection of actionable intelligence from those persons, and the punishment of those persons who had supported the September 11 attack (or other known terrorist attacks against the United States). On the other hand, the United States considered itself a bastion of due process, had always supported the application of the laws of war to all levels of conflict (whether they technically applied or not), and desired to maintain its credibility in the international community (which resoundingly supported U.S. action in Afghanistan).

The Department of Justice opined that the Geneva Conventions, in particular the Geneva Convention Relative to the Treatment of Prisoners of War (GPW), did not apply to the conflict in Afghanistan.¹⁷ With regard to al Qaeda, they reached three conclusions. First, the Geneva Conventions did not apply to non-State actors like al Qaeda because, as a non-government terrorist organization, al Qaeda could not qualify as a High Contracting Party under the Conventions.¹⁸ Second, al Qaeda members did not qualify for prisoner of war status under the GPW because Article 4 of that Convention¹⁹ did not apply to them or, if it did apply, al Qaeda members did not meet any of the Article 4 criteria.²⁰ Third, Common Article 3 of the Geneva Conventions²¹ did not apply to the conflict with al Qaeda because that conflict was not a non-international civil war.²² The applicability of the Geneva Conventions to the Taliban was “a more difficult legal question.”²³ Ultimately, the Department concluded that the President had the constitutional authority to suspend application of the Conventions to the Taliban if he

determined that Afghanistan was a failed state without a legitimate operating central government.²⁴ They also concluded that such a suspension would be permissible under customary international law.²⁵

The Department of State supported the position that the Geneva Conventions did apply to the conflict in Afghanistan.²⁶ They argued that the nature of the conflict, not the status of the groups or individuals involved, was determinative.²⁷ They agreed with the Department of Justice that the United States could deny both Taliban and al Qaeda members prisoner of war status, on either a group or individual basis.²⁸ They believed, however, that the denial should occur only after an overall determination by the Administration that the Conventions applied to the conflict in Afghanistan.²⁹ They posited that a determination that the Conventions did not apply in Afghanistan would reverse the decades-old policy of the U.S. to support application of the Conventions in any conflict in which its armed forces participated and undermine the Geneva Conventions protections for U.S. service members.³⁰ Finally, they were very concerned that a policy that did not support application of the Conventions would have significant international repercussions.³¹

The White House Counsel, the Honorable Alberto R. Gonzalez, supported the Department of Justice position.³² In his opinion, their position provided the nation the most security by granting the greatest amount of flexibility in dealing with the detainees.³³ He believed that granting prisoner of war status to al Qaeda and Taliban detainees would hamper U.S. efforts in the GWOT by precluding the effective interrogation of detainees and requiring that prisoner of war status be determined on a case-by-case basis.³⁴

On 7 February 2002, the President issued his decision.³⁵ He decided that the Geneva Conventions did not apply to al Qaeda, either in the conflict in Afghanistan “or elsewhere.”³⁶ He also decided, on policy not legal grounds, that the Geneva Conventions did apply to the Taliban, but “that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva.”³⁷ He concluded by stating that the United States would treat all “detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.”³⁸

As a result of the President's decision, the United States currently holds hundreds of foreign detainees at its detention facility in Guantanamo Bay, Cuba,³⁹ and one U.S. citizen detainee at the Naval Brig in Charleston, South Carolina,⁴⁰ as unlawful enemy combatants. The detainees are enemy combatants because the United States, or its allies, captured or apprehended them during the global “war” on terror. They are unlawful because the President determined that, as a group or individually, they had engaged in conduct that denied them the

full protections of the Geneva Conventions. The Administration chose Guantanamo Bay as the site of the detention facility because it is outside the sovereign territory of the United States and was deemed unreachable by the U.S. federal courts (outside their jurisdiction).⁴¹ Most of these detainees are Taliban or al Qaeda members captured in the conflict in Afghanistan and have been determined to be enemy combatants.⁴² Many have been detained for almost three years with no end to their detention in sight. Some are being subjected to trial by military commission, although those commissions are currently on hold.⁴³

RASUL V. BUSH, RUMSFELD V. PADILLA, AND HAMDI V. RUMSFELD

Because of the nature of their status and detention, a number of detainees sought access to the U.S. federal court system. The Administration strongly opposed this access, arguing that during time of war enemy combatants were not entitled to a legal review of the terms or conditions of their detention and that such a review would be unconstitutional meddling by the courts in the power of the President as Commander-in-Chief.⁴⁴ These cases ultimately made it to the U.S. Supreme Court and in June of last year the Supreme Court announced its decisions in *Rasul*, *Padilla*, and *Hamdi*.

To properly understand the impact of *Rasul*, *Padilla*, and *Hamdi*, the cases must be read together. While *Rasul* opens wide the federal courthouse door to almost any U.S.-held detainee, *Hamdi*, and to a lesser extent, *Padilla*, close that same door substantially (to what extent, exactly, remains to be seen). In retrospect, if the United States had followed its longstanding policy of treating all enemy combatants in accordance with the Geneva Conventions,⁴⁵ to include Article 5 of the GPW,⁴⁶ the door, at least with respect to non-U.S. citizen detainees, might never have been opened in the first place.

RASUL V. BUSH

In *Rasul*, two Australian and twelve Kuwaiti detainees, all captured in Afghanistan, challenged the legality of their detention at Guantanamo Bay.⁴⁷ In *Padilla* and *Hamdi*, two U.S. citizen detainees, one apprehended on U.S. soil and the other captured in Afghanistan, challenged their detention in the Naval Brig in Charleston, South Carolina.⁴⁸ In all three cases, the Supreme Court was asked to decide whether petitioners were entitled to a legal review in a U.S. federal court of their classification as enemy combatants and consequent detention.⁴⁹

In *Rasul*, the U.S. Government argued that the Supreme Court's precedent, specifically *Johnson v. Eisentrager*⁵⁰, precluded such a review for non-U.S. citizens.⁵¹ In a 6-3 decision authored by Justice Stevens, a majority of the Supreme Court, to include Justice O'Connor, disagreed.⁵² In *Eisentrager*, a post-World War II case, twenty-one German nationals were taken

into custody and convicted of war crimes by a U.S. military commission in China and confined in Germany.⁵³ They sought legal review in the U.S. federal District Court of the District of Columbia.⁵⁴ The Supreme Court held that enemy aliens detained by the United States outside the sovereign territory of the United States were not entitled to access the U.S. federal courts pursuant to a writ of habeas corpus.⁵⁵ The Court in *Rasul* distinguished *Eisentrager* on its facts citing three key differences. First, petitioners in *Rasul* were not citizens of a country engaged in armed conflict with the United States and they denied that they were enemy combatants. Second, petitioners had received no access to a tribunal of any kind. And third, petitioners had been detained for over two years in an area within the exclusive jurisdiction and control of the United States.⁵⁶ This latter point appeared key as the Court spent significant time describing the lease agreement between the United States and Cuba that granted the United States "complete jurisdiction and control" over Guantanamo Bay.⁵⁷ The Court held that under the federal habeas statute, 28 United States Code section 2241⁵⁸, U.S. federal courts have "jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base."⁵⁹ The Court left open the question of the exact nature and extent of that habeas review.

In his concurring opinion, Justice Kennedy stressed two critical differences between *Rasul* and *Eisentrager*.⁶⁰ The first difference was the status of Guantanamo Bay as a quasi-U.S. territory and its distant location from combat operations.⁶¹ The second difference was the fact that the Guantanamo Bay detainees had been indefinitely detained without some legal review of their status.⁶² While acknowledging the soundness of *Eisentrager's* analysis and holding, Justice Kennedy indicated "that there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated."⁶³

In his dissent, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, lambasted the majority for ignoring the doctrine of stare decisis and, in his opinion, overturning the Supreme Court's decision in *Eisentrager*.⁶⁴ He argued that under clearly established precedent, aliens detained outside the sovereign territory of the United States could not avail themselves of the writ of habeas corpus in a U.S. federal court.⁶⁵ He emphasized the limited nature of federal court jurisdiction, especially with respect to the President's authority as Commander-in-Chief and especially in time of war.⁶⁶

RUMSFELD V. PADILLA

In *Padilla*, the U.S. Government moved first to dismiss arguing that Padilla had improperly filed his habeas petition in the District Court for the Southern District of New York.⁶⁷ They argued that in accordance with the federal habeas statute, Padilla should have filed his petition in the District of South Carolina where he was currently confined and where his custodian, the Commander of the Charleston Naval Brig, was located.⁶⁸ Second, the U.S. Government argued that as Commander-in-Chief and pursuant to a congressionally authorized use of military force, the President had the authority to designate Padilla, a U.S. citizen apprehended on U.S. soil, as an enemy combatant and detain him during time of war.⁶⁹ In a 5-4⁷⁰ decision authored by Chief Justice Rehnquist, the Supreme Court accepted the Government's first argument, thus never reaching the second.⁷¹ In dismissing Padilla's habeas petition as improperly filed, the Court left open the question of the extent of the President's authority to detain U.S. citizens as enemy combatants during time of war. In dicta, the dissent stated that the Non-Detention Act, 18 United States Code section 4001(a)⁷², prohibited "the protracted, incommunicado detention of American citizens arrested in the United States" and that Congress' Authorization for Use of Military Force (AUMF) did not overcome that prohibition.⁷³

HAMDI V. RUMSFELD

In *Hamdi*, the U.S. Government argued that the President, as Commander-in-Chief and in defense of the nation, had the authority to designate a U.S. citizen detainee captured abroad as an enemy combatant and hold him indefinitely, without further factual review.⁷⁴ In a plurality and carefully crafted opinion, authored by Justice O'Connor, and joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, the Supreme Court agreed in part and disagreed in part.⁷⁵ The Court held that pursuant to a congressionally authorized use of military force, the President had the authority to detain as an enemy combatant a U.S. citizen captured abroad while engaged in armed conflict with the United States, but only for the duration of the hostilities and subject to review by a neutral decisionmaker.⁷⁶ The Court held further that during an enemy combatant review proceeding, a U.S. citizen detainee was entitled to notice of the facts underlying his enemy combatant classification and "a fair opportunity to rebut" those facts.⁷⁷ Recognizing the potential burden on the Government, however, Justice O'Connor allowed that the proceedings could include hearsay, a rebuttable presumption in favor of the Government, and a shifting of the burden to the petitioner once the Government presented credible evidence of petitioner's enemy combatant status.⁷⁸ In Justice O'Connor's view, the Supreme Court's role

was to strike the appropriate balance between individual rights and national security. As she stated,

In sum, while the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting, the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator.⁷⁹

The Court left open the question of the extent of the President's constitutional power to detain U.S. citizens without congressional authorization. While the Court returned Hamdi's case to the District Court for "a factfinding process that is both prudent and incremental,"⁸⁰ Justice O'Connor suggested that in future cases an Article 5-type tribunal conducted in accordance with Army Regulation 190-8, paragraph 1-6,⁸¹ could satisfy many of the Court's due process concerns and preclude a searching, factfinding habeas review.⁸² She also suggested that in the presence of such a military tribunal review the standard for habeas review might be similar to a "some evidence" standard, that is the court would limit itself to examining the Article 5-type tribunal administrative record to determine whether any evidence in that record supported the Government's conclusions.⁸³ In her opinion, however, Justice O'Connor emphasized the critical role of the writ of habeas corpus as a check on the Executive's power to detain⁸⁴ and reaffirmed "the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law."⁸⁵

While concurring in the Court's judgment granting Hamdi habeas review, Justice Souter, joined by Justice Ginsburg, disagreed that the AUMF granted the president the authority to designate a U.S. citizen an enemy combatant and detain him indefinitely.⁸⁶ In his opinion, a much clearer congressional pronouncement was necessary to overcome the proscription of the Non-Detention Act.⁸⁷ He expressed clear distrust of unbridled Presidential detention power, even in time of war. "In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security."⁸⁸ He allowed, however, that "in a moment of genuine emergency, when the Government must act with no time for deliberation, the Executive may be able to detain a citizen if there is reason to fear he is an imminent threat to the safety of the Nation and its people."⁸⁹

In dissent, Justice Scalia, joined by Justice Stevens, argued that absent suspension of the writ of habeas corpus by Congress, the Executive had no power to detain a U.S. citizen on U.S.

soil, even in time of war, without charging him with a crime.⁹⁰ He accused the majority of legislating from the bench and “transmogrifying” the writ of habeas corpus.⁹¹ In his view, the Court should grant Hamdi’s habeas petition unless the Government charged Hamdi with a crime or Congress suspended the writ of habeas corpus.⁹² While acknowledging the threat of terrorism to U.S. national security, Justice Scalia concluded by stating “Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.”⁹³

In a separate dissenting opinion, Justice Thomas took the opposite view.⁹⁴ In his opinion, the President, in his role as Commander-in-Chief, had almost absolute power to detain an individual he considered a threat to the nation.⁹⁵ Justice Thomas started from the premise that the Executive’s most fundamental responsibility was the nation’s security.⁹⁶ In his view, as long as the President acted in good faith, the judiciary had no business second-guessing an Executive decision to detain an individual on national security or even public safety grounds.⁹⁷ While agreeing that Hamdi had the right to file a habeas petition in federal court, Justice Thomas believed the Court should deny that petition outright without remand.⁹⁸

IMPACT OF RASUL V. BUSH, RUMSFELD V. PADILLA, AND HAMDI V. RUMSFELD

Where do the Supreme Court’s decisions in *Rasul*, *Padilla*, and *Hamdi* leave us? What is the current state of the law with regard to enemy combatants, Executive detention, and access to the U.S. federal courts? *Hamdi* is the seminal case. It prescribes the limits on the President’s power to detain U.S. citizen enemy combatants in time of war. It also prescribes the minimum habeas review due those citizens and, by reasonable inference, non-U.S. citizen enemy combatants detained within reach of the U.S. federal courts. Clearly, after *Hamdi* and *Rasul*, every enemy combatant, U.S. citizen or not, detained within the jurisdiction and control of the United States is entitled to some type of habeas review in the U.S. federal courts. Less clear is the reach of the U.S. federal courts over enemy combatants detained outside the jurisdiction and control of the United States. It appears, however, that a majority of the Supreme Court would extend the writ of habeas corpus to U.S. citizens detained worldwide, while denying that same access to non-U.S. citizens. Also less clear is the exact nature of the habeas review. Arguably, given a prior Article 5-type military tribunal review of a detainee’s enemy combatant status, a majority of the Supreme Court would limit habeas review to a review of that tribunal’s administrative record for some credible evidence of the Government’s assertions.

What do the Supreme Court decisions in *Rasul*, *Padilla*, and *Hamdi* portend for future judicial involvement in the President's role as Commander-in-Chief during the GWOT? What is the appropriate level of judicial scrutiny of decisions made by the President as the Commander-in-Chief? Clearly, every Supreme Court justice, to include Justice Thomas, believes that some judicial oversight of Presidential decisions that affect individual rights within the United States, even in time of war, is necessary. While Justices White, Souter, and Ginsburg would grant the President very little deference in making these wartime decisions, Justice Thomas would grant him almost absolute deference. The majority position appears best reflected by the views of Justice O'Connor. As she states in *Hamdi*, referring to Hamdi's habeas challenge to his detention as an enemy combatant,

While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.⁹⁹

This appears to be the appropriate balance—granting the President as Commander-in-Chief great deference in making broad wartime decisions, while granting him less deference in making wartime decisions that impact on individual rights within the United States.

What about judicial oversight of Presidential decisions affecting the rights of individuals outside the United States? The Supreme Court's position here is less clear. It appears that a majority of the Court would grant the President substantially less deference in decisions affecting the rights of U.S. citizens versus those decisions affecting only the rights of non-U.S. citizens. Once again, this appears to be the appropriate balance. As Justice Scalia states in his dissenting opinion in *Hamdi*, regarding U.S. citizens, "Citizens and noncitizens, even if equally dangerous, are not similarly situated. That captivity may be consistent with the principles of international law does not prove that it also complies with the restrictions that the Constitution places on the American Government's treatment of its own citizens."¹⁰⁰ And as Justice Kennedy notes in his concurring opinion in *Rasul*, referring to the Executive detention of non-U.S. citizen aliens, "The decision in *Eisentrager* indicates that there is a realm of political authority over military affairs where the judicial power may not enter. The existence of this realm acknowledges the power of the President as Commander in Chief, and the joint role of the President and the Congress, in the conduct of military affairs."¹⁰¹

In response to the Supreme Court decisions in *Rasul* and *Hamdi*, the U.S. Government took two actions. First, the Department of Defense established a Combatant Status Review

Tribunal to review the cases of all detainees at Guantanamo Bay, Cuba.¹⁰² The purpose of the tribunal is to determine whether each detainee at Guantanamo Bay satisfies the criteria for classification as an enemy combatant.¹⁰³ Enemy combatant is defined as “an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”¹⁰⁴ The tribunal procedures closely mirror the procedures of Army Regulation 190-8 referred to by Justice O’Conner, while granting each detainee the additional right to a personal representative, a military officer.¹⁰⁵ Second, the Government rendered District Court review in the *Hamdi* case moot by entering into a conditional release agreement with Hamdi.¹⁰⁶ The Government agreed to release Hamdi from detention and in return Hamdi agreed to renounce his U.S. citizenship, return to Saudi Arabia (where he had lived for most of his life), and, in essence, stay there.¹⁰⁷ Should the Administration have done more? What options are available to the Administration regarding its policy toward detainees, U.S. citizen or foreign, captured during the GWOT?

POLICY OPTIONS

Regarding the detention of non-U.S. citizen detainees, the Administration has essentially three options. First, the Administration could maintain the status quo—complete the Combatant Status Review Tribunal process, continue the annual review of enemy combatant detention status,¹⁰⁸ and continue with its policy that Taliban and al Qaeda members captured during the GWOT are presumptively unlawful enemy combatants. While this option appears sustainable in light of *Rasul* and *Hamdi*, it does nothing to address the international implications of the Administration’s decision regarding the applicability of the Geneva Conventions to the conflict in Afghanistan.

Second, the Administration could continue with its review processes while announcing that in the ongoing conflict in Afghanistan, and in similar future conflicts, it will afford all enemy detainees the protections of the Geneva Conventions, to include Article 5 of the GPW. This option does not mean that all enemy detainees will be accorded prisoner of war status. It does mean that in questionable cases the United States will determine a detainee’s status via an Article 5 tribunal. In light of *Hamdi*, this option should satisfy any Supreme Court due process concerns with respect to non-U.S. citizen detainees and result in very limited habeas review. This option would also bring U.S. policy on the applicability of the Geneva Conventions in line with its own historical position and that of much of the international community.¹⁰⁹

Third, the Administration could find some other site for the detention of enemy combatants outside the sovereign territory and jurisdiction and control of the United States. In light of *Rasul*, this option would arguably take these combatants outside the reach of the U.S. federal courts and, thus, eliminate judicial oversight of their detention. This option could also include working with U.S. allies to detain and interrogate their own citizens or citizens of another country captured in their territory.

Regarding the detention of U.S. citizens, the Administration has essentially two options. First, the Administration could continue with its current policy of treating certain U.S. citizens accused of supporting the Taliban or, more likely, al Qaeda or associated terrorist groups, as unlawful enemy combatants, thus subjecting these individuals to military interrogation and indefinite detention. Whether this policy is sustainable for all U.S. citizen detainees in light of the Supreme Court's decision in *Hamdi* is open to question. Hamdi was captured in Afghanistan, an active combat zone—a factor specifically cited by Justice O'Connor in her opinion authorizing the President to classify Hamdi as an enemy combatant. The nature of the opinion (a plurality opinion) and Justice O'Connor's curious silence and majority vote in *Rasul* indicate that the opinion should be interpreted narrowly. Four Justices, Justices Scalia, Stevens, Souter, and Ginsburg, would clearly define *Hamdi* narrowly. Another, Justice Breyer, would probably do so.¹¹⁰

Second, the Administration could announce that it will treat U.S. citizen enemy combatants captured or apprehended in the GWOT as criminals and prosecute them via the normal federal criminal process. This option would address the Supreme Court's fundamental concerns with Executive overreach in the detention of U.S. citizens by granting U.S. citizen detainees additional due process. It would require the Government to prosecute and convict U.S. citizen detainees in a court of law. Whatever option the Administration chooses, it should ensure that all similarly situated U.S. citizen enemy combatants are treated the same. Treating them differently (compare John Walker Lindh¹¹¹ with Yaser Esam Hamdi) raises substantial questions of fairness and invites judicial scrutiny.

POLICY RECOMMENDATION

The Administration should continue with its review processes with respect to detainees at Guantanamo Bay, announce that the Geneva Conventions apply to the ongoing conflict in Afghanistan, and will apply in all similar future conflicts, and prosecute U.S. citizen detainees in federal court. Together, these options best balance U.S. security concerns, U.S. international obligations, and the individual rights of U.S. and non-U.S. citizens.

The United States currently faces a quandary. It wants to prosecute a global “war” on terror, but it does not want to abide by all of the traditional laws of war that apply to armed conflict. It wants the Geneva Conventions to apply to U.S. military members, but not necessarily to the enemy. It wants to abide by its rules and regulations (for example, Army Regulation 190-8) when convenient, but not when inconvenient. It wants, in essence, to have it both ways. Current U.S. policy is certainly understandable in light of the most fundamental duty of the President, the security of the nation. However, affording Geneva Convention protection to all non-U.S. citizen detainees would not undermine these very legitimate U.S. security concerns.

Under the Geneva Conventions, groups or individual detainees who do not comply with the Conventions are not entitled to its protections (other than the basic protection that all individuals will be treated humanely). Only in questionable cases is an individual detainee entitled to prisoner of war status, and only until an Article 5 tribunal determines his true status. Applying the Geneva Conventions and the Article 5 tribunal process would address a very real concern with the current Administration policy and the amorphous nature of al Qaeda, and terror groups in general—who is a “true” member of these terrorist groups and who is not? Should we treat the cook hired under threat of death the same as the suicidal zealot bent on U.S. destruction? How do we determine the difference, at least in the absence of clear and verifiable intelligence, without some minimal due process review? This minimal due process review is exactly what is now required, at least at Guantanamo Bay and in the United States, by the Supreme Court decisions in *Rasul* and *Hamdi*. Providing that review within the framework of the Geneva Conventions costs the Administration very little. In addition, conducting an Article 5 tribunal early in the detention process provides the Government the best opportunity to build an administrative record that will later satisfy the habeas review alluded to by Justice O’Conner in *Hamdi*. Finally, in the truly exceptional case (for example, a known high value intelligence target), the Administration could detain that individual outside the jurisdiction and control of the United States or work with U.S. allies to detain that individual in their country, thus insulating truly critical national security cases from U.S. federal court judicial scrutiny.

Adoption of these options would also enhance U.S. international standing by allowing the Administration to regain the moral high ground and by bringing the Administration’s policy in line with that of the international community, particularly the International Committee of the Red Cross, the organization responsible for international compliance with the Geneva Conventions.¹¹² It would also reinforce the longstanding U.S. policy of applying the Geneva Conventions notwithstanding the type or level of conflict.

Finally, these options allow U.S. citizens access to U.S. courts. This is a fundamental principle of our constitutional system. A core theme of *Rasul*, *Padilla*, and *Hamdi* is that the U.S. Constitution does not mandate equal treatment for U.S. and non-U.S. citizens. Executive detention of U.S. citizens is more circumscribed than that of non-U.S. citizens. Denying U.S. citizens their liberty without due process of law should only occur in extreme circumstances (in Justice Scalia's opinion, only if the U.S. Congress suspends the writ of habeas corpus). To date in the GWOT, the United States has only classified three U.S. citizens as enemy combatants, John Walker Lindh, Yaser Esam Hamdi, and Jose Padilla. Only Jose Padilla's case remains unresolved. Trying Padilla and future U.S. citizen enemy combatants in federal court should not create an unreasonable burden on the Government or significantly affect U.S. national security.

The other options are less desirable. Regarding non-U.S. citizen detainees, the status quo gives insufficient weight to our international obligations and provides little security advantage over the options outlined above, especially in light of *Rasul* and *Hamdi*. Moving all Guantanamo Bay detainees outside the territory and jurisdiction and control of the United States might enhance national security, but it would be costly in terms of resources and international standing and prestige. Maintaining the status quo as to U.S. citizen detainees fails to address one of the most basic of U.S. constitutional principles, an individual citizen's right to freedom.

RISK ASSESSMENT

Adopting these policy changes carries some risk. First, "improving" the status of al Qaeda members might not play well with the American public, especially in light of the ongoing conflicts in Afghanistan and Iraq. Second, treating non-U.S. citizen detainees as prisoners of war and U.S. citizen detainees as criminals could reduce the intelligence-gathering ability of the U.S. Government (arguably, prisoners of war and criminals would be subject to less intensive interrogation because of their status). Third, detainees classified as prisoners of war or criminals might require earlier release than those classified more broadly as enemy combatants. Fourth, and finally, this policy change could require additional resources if some non-U.S. citizen detainees are granted prisoner of war status and U.S. citizen detainees are treated as criminals. The provisions of the GPW are extensive and compliance could entail increased costs in terms of people and money. Criminal trials can also be expensive in terms of time, people, and money. None of these risks is insurmountable. The Administration could announce the policy in terms of some broader effort to work with the international community to develop an international scheme to deal with terrorists. If critical, the Administration could deal with the interrogation/security issue by working with U.S. allies to detain and interrogate their own

citizens or citizens of another country captured in their territory. And finally, resources are available—it is simply a matter of making difficult choices and applying those resources when and where needed.

What are the risks of maintaining the status quo? Clearly, the continued erosion of the protections of the Geneva Conventions and individual rights will have a pernicious and long-term effect on U.S. international standing and the U.S. constitutional system. United States standing in the international community has already suffered immensely in light of the Administration's decisions regarding detainees captured or apprehended during the GWOT. Those decisions, and the continued detainment of enemy combatants at Guantanamo Bay, continue to be a lightening rod for international criticism. Just recently, the Administration succumbed to pressure from the British and Australian governments and transferred detainees from those countries to their respective governments.¹¹³ International, and domestic, pressure will only grow as conflict in Afghanistan and elsewhere subsides and the length of the detention of the Guantanamo Bay detainees and Jose Padilla grows. Any Administration policy adopted must address that pressure and the legitimate concerns it represents.

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ENDNOTES

¹ *Rasul v. Bush*, 124 S.Ct. 2686 (2004).

² *Rumsfeld v. Padilla*, 124 S.Ct. 2711 (2004).

³ *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004).

⁴ *Rasul*, 124 S.Ct. at 2690-2699; and *Hamdi*, 124 S.Ct. at 2635-2652.

⁵ Department of Defense, *News Transcript: Defense Department Background Briefing on the Combatant Status Review Tribunal* (Washington, D.C.: Department of Defense, 7 July 2004); available from <<http://www.defenselink.mil/transcripts/2004/tr20040707-0981.html>>; Internet, accessed 21 September 2004.

⁶ National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (Harrisonburg, VA/Crawfordsville, IN: RR Donnelley, 2004), 1-14 and Back Cover.

⁷ *Authorization for Use of Military Force, Public Law 107-40*, secs. 1-2 (2001).

⁸ Bob Woodward, *Bush at War* (New York: Simon & Schuster, 2002), 26-32.

⁹ National Commission on Terrorist Attacks Upon the United States, 336-337.

¹⁰ The White House, *Radio Address of the President to the Nation* (Washington, D.C.: The White House, 6 October 2001); available from <<http://www.whitehouse.gov/news/releases/2001/10/print/20011006.html>>; Internet, accessed 14 December 2004.

¹¹ *Ibid.*

¹² Woodward, 209-210.

¹³ *Ibid.*, 249.

¹⁴ National Commission on Terrorist Attacks Upon the United States, 337-338.

¹⁵ *Ibid.*

¹⁶ The four 1949 Geneva Conventions for the Protection of War Victims are the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; the Geneva Convention Relative to the Treatment of Prisoners of War; and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. The United States ratified the four Geneva Conventions on 2 February 1956. Department of the Army, *The Law of Land Warfare*, Field Manual 27-10 (Washington, D.C.: U.S. Department of the Army, July 1956), i-iii.

¹⁷ Assistant Attorney General Jay Bybee, "Application of Treaties and Laws to al Qaeda and Taliban Detainees," memorandum for Counsel to the President and General Counsel of the Department of Defense, Washington, D.C., 22 January 2002 [database on-line]; available from The National Security Archive; accessed 3 September 2004.

¹⁸ Ibid., 9.

¹⁹ Article 4, GPW, describes the categories of persons entitled to prisoner of war status and, as a result, the protections outlined in the GPW. Department of the Army, *The Law of Land Warfare*, Field Manual 27-10, 25-27.

²⁰ Bybee, 9-10.

²¹ The third Article of each of the four Geneva Conventions is identical. It prescribes minimum humanitarian standards for the treatment of persons taking no active part in hostilities during armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties. Department of the Army, *The Law of Land Warfare*, Field Manual 27-10, 9-10.

²² Bybee, 10.

²³ Ibid.

²⁴ Ibid., 22.

²⁵ Ibid., 25.

²⁶ Department of State Legal Advisor William Taft, IV, "Comments on Your Paper on the Geneva Convention," memorandum for Counsel to the President, Washington, D.C., 2 February 2002 [database on-line]; available from The National Security Archive; accessed 3 September 2004; and Secretary of State Colin Powell, "Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan," memorandum for Counsel to the President and Assistant to the President for National Security Affairs, Washington, D.C., 26 January 2002 [database on-line]; available from The National Security Archive; accessed 3 September 2004.

²⁷ Taft, 2.

²⁸ Powell, 1-2.

²⁹ Taft, 1-2.

³⁰ Powell, 2.

³¹ Ibid., 2-3.

³² Counsel to the President Alberto Gonzales, "Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban," memorandum for The President, Washington, D.C., 25 January 2002 [database on-line]; available from The National Security Archive; accessed 3 September 2004.

³³ Ibid, 2.

³⁴ Ibid.

³⁵ President George Bush, "Humane Treatment of al Qaeda and Taliban Detainees," memorandum for The Vice President, The Secretary of State, The Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs, Chairman of the Joint Chiefs of Staff, Washington, D.C., 7 February 2002 [database on-line]; available from The National Security Archive; accessed 3 September 2004.

³⁶ Ibid, 1.

³⁷ Ibid, 2.

³⁸ Ibid.

³⁹ Department of Defense, *News Release: Transfer of Detainees Completed* (Washington, D.C.: Department of Defense, 22 September 2004); available from <<http://www.defenselink.mil/releases/2004/tr20040922-1310.html>>; Internet, accessed 9 October 2004.

⁴⁰ *Padilla*, 124 S.Ct. at 2715-2716.

⁴¹ Deputy Assistant Attorneys General Patrick Philbin and John Yoo, "Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba," memorandum for General Counsel, Department of Defense, Washington, D.C., 28 December 2001 [database on-line]; available from The National Security Archive; accessed 3 September 2004. The Department of Justice concluded that federal district courts lacked jurisdiction over habeas petitions filed by alien detainees at Guantanamo Bay.

⁴² Department of Defense, *News Transcript: Special Defense Department Briefing on Status of Military Tribunals* (Washington, D.C.: Department of Defense, 20 December 2004); available from <<http://www.defenselink.mil/transcripts/2004/tr20041220-1841.html>>; Internet, accessed 2 January 2005. As of 20 December 2004, DoD had conducted 507 Combatant Status Review Tribunal hearings, with approximately 50 hearings remaining. Of the 507 hearings conducted, 230 had been completed, with 228 detainees classified as enemy combatants and two classified as not enemy combatants.

⁴³ Carol D. Leonnig and John Mintz, "Judge Says Detainees' Trials Are Unlawful," 9 November 2004; available from <<http://www.washingtonpost.com/ac2/wp-dyn/A34519-2004Nov8?language=printer>>; Internet; accessed 9 January 2005.

⁴⁴ *Hamdi*, 124 S.Ct. at 2645.

⁴⁵ See Department of Defense, *DoD Law of War Program*, Department of Defense Directive 5100.77 (Washington, D.C.: U.S. Department of Defense, 9 December 1998), 4; and Department of Defense, *DoD Program for Enemy Prisoners of War (EPOW) and Other Detainees (Short Title: DoD Enemy POW Detainee Program)*, Department of Defense Directive 2310.1 (Washington, D.C.: U.S. Department of Defense, 18 August 1994), 2.

⁴⁶ Article 5, GPW, states, in part, "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [which defines prisoners of war], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by

a competent tribunal.” Department of the Army, *The Law of Land Warfare*, Field Manual 27-10, 30.

⁴⁷ *Rasul*, 124 S.Ct. at 2690.

⁴⁸ *Padilla*, 124 S.Ct. at 2715-2716; and *Hamdi*, 124 S.Ct. at 2635-2636.

⁴⁹ *Rasul*, 124 S.Ct. at 2690; *Padilla*, 124 S.Ct. at 2715; and *Hamdi*, 124 S.Ct. at 2635.

⁵⁰ *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

⁵¹ *Rasul*, 124 S.Ct. at 2693.

⁵² *Ibid.*, 2689.

⁵³ *Eisentrager*, 339 U.S. at 765-766.

⁵⁴ *Ibid.*, 765.

⁵⁵ *Ibid.*, 763-764.

⁵⁶ *Rasul*, 124 S.Ct. at 2693.

⁵⁷ *Ibid.*, 2690-2698.

⁵⁸ 28 United States Code section 2241 states, in part, “Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions* (emphasis added).”

⁵⁹ *Rasul*, 124 S.Ct. at 2698.

⁶⁰ *Ibid.*, 2700.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*, 2699-2700.

⁶⁴ *Ibid.*, 2706.

⁶⁵ *Ibid.*, 2701.

⁶⁶ *Ibid.*, 2701, 2710-2711.

⁶⁷ *Padilla*, 124 S.Ct. at 2716.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ Along with Chief Justice Rehnquist, the majority included Justices O'Connor, Scalia, Kennedy, and Thomas. The dissent included Justices Stevens, Souter, Ginsburg, and Breyer. *Padilla*, 124 S.Ct. at 2714.

⁷¹ *Ibid.*, 2715.

⁷² 18 United States Code section 4001(a) states, "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."

⁷³ *Padilla*, 124 S.Ct. at 2735.

⁷⁴ *Hamdi*, 124 S.Ct. at 2636.

⁷⁵ *Ibid.*, 2635-2652.

⁷⁶ *Ibid.*, 2335-2648.

⁷⁷ *Ibid.*, 2648.

⁷⁸ *Ibid.*, 2649.

⁷⁹ *Ibid.*, 2650.

⁸⁰ *Ibid.*, 2652.

⁸¹ Department of the Army, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, Army Regulation 190-8 (Washington, D.C.: U.S. Department of the Army, 1 October 1997). Army Regulation 190-8 is a joint regulation that establishes U.S. policy on the treatment of all categories of detainees held by the United States during all levels of conflict. Paragraph 1-6 establishes procedures for the conduct of Article 5, GPW, tribunals. Department of Defense Directive 2310.1 assigns responsibility for all detainee operations to the Department of the Army. Department of Defense, *DoD Program for Enemy Prisoners of War (EPOW) and Other Detainees (Short Title: DoD Enemy POW Detainee Program)*, Department of Defense Directive 2310.1, 3-4.

⁸² *Hamdi*, 124 S.Ct. 2651.

⁸³ *Ibid.*, 2645 and 2651.

⁸⁴ *Ibid.*, 2650.

⁸⁵ *Ibid.*, 2647.

⁸⁶ *Ibid.*, 2653.

⁸⁷ *Ibid.*, 2653-2655.

⁸⁸ *Ibid.*, 2655.

⁸⁹ *Ibid.*, 2659.

⁹⁰ Ibid., 2660-2661.

⁹¹ Ibid., 2672.

⁹² Ibid., 2673-2674.

⁹³ Ibid., 2674.

⁹⁴ Ibid., 2674-2675.

⁹⁵ Ibid., 2680-2682.

⁹⁶ Ibid., 2675.

⁹⁷ Ibid., 2680-2682.

⁹⁸ Ibid., 2678 and 2674.

⁹⁹ Ibid., 2649-2650.

¹⁰⁰ Ibid., 2671, note 5.

¹⁰¹ *Rasul*, 124 S.Ct. at 2700.

¹⁰² Department of Defense, *News Transcript: Defense Department Background Briefing on the Combatant Status Review Tribunal*.

¹⁰³ Secretary of the Navy Gordon England, "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba," memorandum for Distribution, Washington, D.C., 29 July 2004, 1.

¹⁰⁴ Ibid., Enclosure (1), 1.

¹⁰⁵ Ibid., Enclosure (1), 1-2.

¹⁰⁶ Federal Public Defender Frank Dunham, Jr., "Motion to Stay Proceedings," motion in the United States District Court for the Eastern District of Virginia Norfolk Division, Norfolk, Virginia, 24 September 2004.

¹⁰⁷ Ibid.

¹⁰⁸ See Department of Defense Designated Civilian Official Gordon England, "Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba," memorandum for See Distribution, Washington, D.C., 14 September 2004 (establishing procedures for the annual review of the continuing need for the detention of each enemy combatant at Guantanamo Bay). Administrative review procedures were actually in place prior to the establishment of the Combatant Status Review Tribunal.

¹⁰⁹ See Congressional Research Service, *Treatment of "Battlefield Detainees" in the War on Terrorism* (Washington, D.C.: U.S. Congressional Research Service, 11 April 2002), 1-2.

¹¹⁰ *Padilla v. Hanft*, Civil No. 2:04CV2221, currently being heard in the United States District Court for the District of South Carolina, may resolve the issue.

¹¹¹ John Walker Lindh, the “American Taliban,” was convicted in the United States District Court for the Eastern District of Virginia of supporting the Taliban and carrying a rifle and hand grenades and sentenced to 20 years in federal prison. See Susan Candiotti, “Walker Lindh sentenced to 20 years,” 4 October 2002; available from <<http://archives.cnn.com/2002/LAW/10/04/lindh.statement/>>; Internet; accessed 15 January 2005.

¹¹² Congressional Research Service, *Treatment of “Battlefield Detainees” in the War on Terrorism*, 1-2.

¹¹³ See Agence France Presse, “Ex-Guantanamo detainees walk free from British prison,” 26 January 2005; available from <http://news.yahoo.com/news?tmpl=story&u=/afp/20050126/wl_uk_afp/usattacksguantanamo_050126234510>; Internet; accessed 31 January 2005; and Dana Priest, “Detainee Sent Home to Australia,” 29 January 2005; available from <<http://www.washingtonpost.com/wp-dyn/articles/A45643-2005Jan28.html>>; Internet; accessed 31 January 2005. The British government released the four British detainees one day after their arrival in Great Britain; the Australian detainee was released immediately upon his arrival in Australia.

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